STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of PATRICIA KEENER, Minor.

DEPARTMENT OF HUMAN SERVICES, f/k/a FAMILY INDEPENDENCE AGENCY,

Petitioner-Appellee,

v

TAMMY KEENER-WALDEN,

Respondent-Appellant.

UNPUBLISHED
October 20, 2005

No. 261709
Macomb Circuit Court
Family Division
LC No. 01-050849-NA

Before: Owens, P.J., and Fitzgerald and Schuette, JJ.

PER CURIAM.

Respondent appeals as of right from an order terminating her parental rights to the minor child under MCL 712A.19b(3)(c)(i), (g), and (j). We affirm.

Respondent resides in Tennessee and did not personally appear at any of the hearings in this matter, but was represented by counsel at most of the proceedings. According to respondent's attorney, respondent was unable to travel to Michigan because she is disabled due to a closed-head injury. The trial court originally obtained jurisdiction over the child based on the father's no contest plea.[1] The court thereafter scheduled a jury trial to determine jurisdiction with respect to respondent, but subsequently entered a "default" against her when she failed to appear for the scheduled trial.

Respondent first argues that the trial court erred by assuming jurisdiction on the basis of a default for her failure to appear at the adjudicative hearing. We agree with respondent that there is no authority for applying the default procedures in MCR 2.603 to child protective proceedings. See MCR 3.901(A)(2). Rather, the trial court may assert jurisdiction over a child only if a statutory ground for jurisdiction is established by a respondent's plea, or by a preponderance of the evidence at an adjudicative trial. MCR 3.971; MCR 3.972; *In re PAP*, 247 Mich App 148,

[1] The child's father, who had been awarded sole custody in September 1994, later voluntarily released his parental rights and is not a party to this appeal.

153; 640 NW2d 880 (2001). In this case, it is unclear from the record whether the trial court proceeded with a hearing in respondent's absence, see MCR 3.972, because a complete transcript of the adjudicative hearing is not available.

Regardless, respondent did not file an appeal by right from the dispositional order entered after the trial court's jurisdictional decision. See MCR 3.993(A)(1). Consequently, respondent may not now collaterally attack the trial court's exercise of jurisdiction in this appeal by right from the trial court's later order terminating her parental rights. *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993); *In re Powers*, 208 Mich App 582, 587-588; 528 NW2d 799 (1995).

In any event, the trial court had already obtained jurisdiction over the child based on the father's no contest plea. The trial court's jurisdiction is tied to the child, not the parents, and the court was not required to independently establish jurisdiction with respect to respondent. *In re CR*, 250 Mich App 185, 200-205; 646 NW2d 506 (2002).

For these reasons, we reject this claim of error.

Respondent next argues that petitioner failed to offer appropriate services to accommodate her disabilities under the Americans with Disabilities Act (ADA), 42 USC 12101 *et seq.* In *In re Terry*, 240 Mich App 14, 24-25; 610 NW2d 563 (2000), this Court held that a parent may not raise alleged violations of the ADA as a defense in proceedings to terminate parental rights because termination proceedings are not "services, programs or activities" under the ADA.

> Nevertheless, the ADA does require a public agency, such as the Family Independence Agency (FIA), to make reasonable accommodations for those individuals with disabilities so that all persons may receive the benefits of public programs and services. Thus, the reunification services and programs provided by the FIA must comply with the ADA. . . .
>
> Any claim that the FIA is violating the ADA must be raised in a timely manner, however, so that any reasonable accommodations can be made. Accordingly, if a parent believes that the FIA is unreasonably refusing to accommodate a disability, the parent should claim a violation of her rights under the ADA, either when a service plan is adopted or soon afterward. The court may then address the parent's claim under the ADA. Where a disabled person fails to make a timely claim that the services provided are inadequate to her particular needs, she may not argue that petitioner failed to comply with the ADA at a dispositional hearing regarding whether to terminate her parental rights. In such a case, her sole remedy is to commence a separate action for discrimination under the ADA. At the dispositional hearing, the family court's task is to determine, as a question of fact, whether petitioner made reasonable efforts to reunite the family, without reference to the ADA. [*In re Terry, supra* at 25-26 (footnotes omitted).]

The failure to timely raise the issue of violation of a parent's rights under the ADA constitutes a waiver of the issue. *Id*. at 26 n 5.

While petitioner was aware of respondent's disability, respondent never raised the issue of compliance with the ADA before the termination proceedings began. Respondent was required to timely raise the issue of ADA compliance, not merely rely on the fact that petitioner and the trial court were aware of her disability. To the extent that petitioner may have failed to accommodate respondent's disability, it was incumbent on respondent to ask for accommodation. Indeed, respondent did not submit to a physical evaluation by her doctor as required by her parent-agency agreement, so it was not clear to what extent respondent was disabled and what type of special services might be required. In sum, because respondent did not timely raise the issue of ADA compliance, she may not now rely on the ADA to argue that the services offered failed to comply with the ADA.

Respondent also argues that the trial court improperly removed her appointed counsel during the pendency of these proceedings. The court discharged respondent's attorney in July 2003 because respondent had not contacted counsel, but counsel was reinstated a short time later. Respondent's counsel was again discharged in January 2004, and not reinstated until August 2004, when proceedings to terminate respondent's parental rights became imminent.

In *In re Hall*, 188 Mich App 217, 220, 222-223; 469 NW2d 56 (1991), this Court held that reversal was not required in a parental termination case where the respondent was not prejudiced as a result of not being represented by counsel during a portion of a child protection proceeding. *Id.* at 222-223. In that case, the trial court heard testimony at a review hearing at which the respondent was not represented, but the testimony was later repeated at the termination hearing where counsel was present and the testimony in question played an insignificant role in the trial court's decision to terminate the respondent's parental rights.

In this case, it appears that respondent was unrepresented at only two court proceedings: (1) a review hearing, and (2) a hearing at which the court acknowledged that respondent should be represented by counsel and, therefore, did not further consider the matter until counsel was reappointed. On this record, there is no basis to conclude that respondent was prejudiced by the temporary absence of counsel. Contrary to respondent's argument, the trial court did not conduct any critical hearings or make important decisions with regard to her case during that time. Therefore, reversal is not warranted.

Respondent next argues that the trial court clearly erred in finding that the statutory grounds for termination were proven by clear and convincing evidence, and that termination of her parental rights was in the child's best interests. This Court reviews a trial court's findings of fact in a parental termination case under the clearly erroneous standard. MCR 3.977(J); *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989). Once a statutory ground for termination is established, pursuant to MCL 712A.19b(5), "the court must issue an order terminating parental rights unless there exists clear evidence, on the whole record, that termination is not in the child's best interests." *In re Trejo*, 462 Mich 341, 354; 612 NW2d 407 (2000). The court's decision regarding the child's best interests is also reviewed for clear error. *Id*. at 356-357.

A parent's failure to comply with a parent-agency agreement is evidence of the parent's failure to provide proper care and custody of the child. *In re JK*, 468 Mich 202, 214; 661 NW2d 216 (2003). The evidence disclosed that respondent failed to make any real progress with her treatment plan, never personally visited the child during the three-year period of these proceedings, and failed to demonstrate that she could provide the child with a safe and suitable

home. The trial court did not clearly err in finding that the statutory grounds for termination were proven by clear and convincing evidence.

Further, the evidence did not clearly show that termination of respondent's parental rights was not in the child's best interests. The evidence demonstrated that there was little bonding between respondent and the child. Although respondent maintained telephone contact with the child, those calls were often disturbing to the child. The evidence strongly favored termination of respondent's parental rights based on the child's best interests so that the child could have closure and obtain the type of structure and supervision she needed to become a successful, independent adult.[2] Further, because a statutory ground for termination was properly established, the trial court was not authorized to allow respondent additional time to work on her parent-agency agreement. *In re Gazella*, 264 Mich App 668, 673-674; 692 NW2d 708 (2005).

Affirmed.

/s/ Donald S. Owens
/s/ E. Thomas Fitzgerald
/s/ Bill Schuette

[2] Respondent incorrectly argues that "[t]he rights of the natural parent in the care, custody and management of the child allows a rebuttable presumption that the best interest of the child is served by giving custody to the natural parent." Rather, once a statutory ground for termination is proven under § 19b(3), "the parent's interest in the companionship, care, and custody of the child gives way to the state's interest in the child's protection." *In re Trejo, supra* at 356.